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QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Chairman-Rapporteur: Mr. Carlos Vargas Pizarro (Costa Rica)

CONTENTS

	Paragraphs	Page
Introduction	1 - 3	3
I. ORGANIZATION OF THE SESSION	4 - 17	3
A. Election of officers	4	3
B. Attendance	5 - 9	3
C. Documentation	10	4
D. Organization of work	11 - 17	4

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CONTENTS (continued)

		Paragraphs	Page
II.	CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES .	18 - 144	5
III.	FUTURE WORK	145	24
IV.	ADOPTION OF THE REPORT	146 - 148	24

Annexes

I.	Text of the articles which constitute the outcome of the first reading	25
II.	Text of additional proposals considered by the working group . . .	36

Introduction

1. The Commission on Human Rights, in its resolution 1995/33 of 3 March 1995, took note of the report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/1995/38 and Add.1) and requested it to meet between sessions, for a period of two weeks prior to the fifty-second session of the Commission in order to pursue its work and to submit a new report to the Commission. The present report is submitted pursuant to that request.

2. The Economic and Social Council, in its decision 1995/33 of 25 July 1995, authorized an opened-ended working group of the Commission to meet for a period of two weeks prior to its fifty-second session.

3. Consequently, the working group held its fourth session from 30 October to 10 November 1995. It was opened by the Assistant Secretary-General for Human Rights, who made an introductory statement.

I. ORGANIZATION OF THE SESSION

A. Election of officers

4. At its 1st meeting, on 30 October 1995, the working group elected Mr. Carlos Vargas Pizarro (Costa Rica) as Chairman-Rapporteur.

B. Attendance

5. Representatives of the following States, members of the Commission on Human Rights, attended the meetings of the working group, which were open to all members of the Commission: Algeria, Australia, Austria, Brazil, Bulgaria, Canada, Chile, China, Cuba, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Hungary, Japan, Mexico, Nepal, the Netherlands, Nicaragua, Peru, the Philippines, Poland, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

6. The following States, non-members of the Commission on Human Rights, were represented by observers at the meetings of the working group: Argentina, Costa Rica, Cyprus, Denmark, Greece, Guatemala, Israel, Iraq, Libyan Arab Jamahiriya, New Zealand, Nigeria, Portugal, Senegal, South Africa, Spain, Sweden, Syrian Arab Republic and Uruguay.

7. Switzerland, which is not a member of the United Nations, was represented by an observer.

8. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the meeting of the working group: Amnesty International, Human Rights Watch, the International Commission of Jurists, International Federation Action of Christians for the Abolition of Torture and International Service for Human Rights.

9. Upon the decision of the working group, the African Commission of Health and Human Rights Promoters and the Association for Prevention of Torture, which do not have consultative status with the Economic and Social Council, were also represented by observers.

C. Documentation

10. The working group had before it the following documents:

E/CN.4/1995/WG.11/L.1	Provisional agenda
E/CN.4/1995/WG.11/WP.1	Working paper submitted by the Secretariat pursuant to Commission on Human Rights resolution 1995/33
E/CN.4/1995/WG.11/WP.2	Working paper submitted by Portugal
E/CN.4/1991/66	Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights

The text of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and an explanatory note by the Council of Europe.

The text of the Inter-American Convention to Prevent and Punish Torture.

D. Organization of work

11. At its 1st meeting, on 30 October 1995, the working group adopted its agenda, contained in document E/CN.4/1995/WG.11/L.1.

12. The Chairman-Rapporteur made an opening statement, referring to the work accomplished during the previous three sessions of the working group. He recalled that the aim of the group was to elaborate a mechanism to assist States to take effective measures to prevent acts of torture by way of regular visits to places where persons were deprived of their liberty, in order to strengthen protection for those persons against torture and other cruel, inhuman or degrading treatment or punishment. He expressed the wish that progress should be made in the drafting process, in the light of the call of the World Conference on Human Rights for the early adoption of an optional protocol to the Convention against Torture. He recalled that the draft submitted by the Government of Costa Rica should constitute the basis and frame of reference for the group's deliberations. The working group's reports adopted at its three previous sessions, together with the comments and suggestions that had been made by Governments, specialized agencies, supervisory bodies and non-governmental organizations (E/CN.4/1995/WG.11/WP.1 and WP.2), would provide the basis for decisions to be taken on revisions or

amendments to the draft optional protocol at the current session. He invited the group to continue its work and submit its report to the Commission, in accordance with resolution 1995/33.

13. At the suggestion of the Chairman-Rapporteur an informal open-ended drafting group, chaired by Ms. Ann Marie Pennegard, the observer for Sweden, was established to work out proposals on the wording of the articles considered and revised by the working group. Also at the suggestion of the Chairman, the working group decided to continue consideration of articles 14 to 21, on the basis of the draft submitted by the Government of Costa Rica, modifying or replacing particular provisions in that text as necessary.

14. It was also decided that, when the working group had completed its first reading of the draft in its entirety, a second reading of the text would be undertaken with a view to its final adoption by the working group.

15. It was agreed that when the whole text had been covered in this way, further consideration would have to be given to the title of the draft optional protocol, as well as to its preamble. It was also agreed that, when the whole text had been considered in second reading, further consideration would have to be given to the placement of certain articles (and probably of particular paragraphs in certain articles).

16. The working group had the advantage of hearing the representative of the Committee against Torture and of the European Committee for the Prevention of Torture, Mr. Bent Sorensen, review the practice of both bodies and his practical experience with respect to issues considered by the working group.

17. The Secretary read out a letter from Mr. Nigel S. Rodley, Special Rapporteur on torture of the Commission on Human Rights, explaining that financial limitations prevented him from attending the session and requesting that his written observations of the previous year be again made available to the working group.

II. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES

18. In the light of the above-mentioned decisions on its working methods, the working group embarked on its examination and revision of the draft submitted by the Government of Costa Rica (E/CN.4/1991/66) and supplemented by the comments and suggestions of Governments, specialized agencies, treaty bodies and non-governmental organizations, contained in documents E/CN.4/1995/WG.11/WP.1 and WP.2. The drafting process was mainly undertaken by the informal drafting group, which attempted to reconcile the various proposals under consideration.

19. The results of the work of the informal drafting group were reported to the plenary meetings of the working group. The chairperson of the informal drafting group stated that that group, in considering the text of relevant draft articles, had taken into account the general and specific comments, as well as concrete proposals for amendments to the consolidated text of articles 10 and 11, and to articles 14 to 21.

20. In the course of its work on the articles referred to above, the informal drafting group had also formulated and adopted five new articles, which it had provisionally numbered as articles 16 bis, 18 bis, 19 bis, 19 tertio and 20 bis, without prejudice to their placement.

21. The Chairman-Rapporteur of the working group considered the results of the informal drafting group and submitted to the plenary meeting for approval the text of relevant articles. The text of articles 1 to 12, 13, 12 bis, 14 to 16 bis, 17, 18, 18 bis, 19, 19 bis, 19 tertio, 20, 20 bis, and 21, as contained in annex 1 to the present report, constitute the outcome of the first reading of the draft optional protocol during the second, third and fourth sessions of the working group.

Articles 10 and 11

22. Articles 10 and 11 were reconsidered by the working group at its 6th and 7th plenary meetings, on 9 and 10 November 1995.

23. At its 6th plenary meeting, the representative of the Committee against Torture emphasized the importance of having experts in a delegation. Such experts could be doctors, psychologists or prison and police experts. He also pointed out that the selection of experts should be performed by a delegation of the sub-committee that was to carry out a mission to a State Party. In his view, the main criterion for their selection should be their competence. An expert should not visit his own country and a Government could object to the visit of one or another expert without giving a reason for such objection.

24. The representative of El Salvador suggested that another attempt should be made to consolidate articles 10 and 11 and invited other delegations to consult her delegation to that effect. In her view, the consolidated text should be based on proposals submitted at the 1994 session and those put forward during informal consultations. Her suggestion was supported by a majority of the delegations.

25. The representative of the United States of America drew attention to the proposal of his delegation contained in document E/CN.4/1995/38. He believed that that proposal was still valid and as such should be adequately reflected in a new text. In addition, he pointed out that the proposal conveyed the sense that advisers would be experts and that they would have the requisite knowledge and experience in areas to be covered by the optional protocol to perform their functions.

26. The representative of China pointed out that his delegation's proposal as to the text of articles 10 and 11 could be found on page 19 of the English version of document E/CN.4/1995/38. His delegation wished to resubmit the proposals for further consideration by the working group and he reiterated its position. In its opinion, the provisions of articles 10 and 11 were closely linked with those of article 4 dealing with the composition and election of the members of the sub-committee. He also reiterated his delegation's position that the need for experts to assist a mission was dubious, in view of the fact, inter alia, that members of the sub-committee would themselves be

experts in relevant fields. It was necessary first to make a decision on the composition of the sub-committee and then the mechanism provided for in articles 10 and 11 should be dealt with.

27. The representative of Japan stated that her delegation preferred the consolidated text of articles 10 and 11 contained on page 18 of the English version of the report of the previous session. However, it proposed the deletion of the words "in cooperation with the United Nations Crime Prevention Branch" in paragraph 2 (a) of that text. As to paragraph 4, in her delegation's view, a State Party should not give any reasons as to why an adviser or interpreter might not take part in a mission. Therefore, it proposed to delete the words "and for reasons given confidentially" in that paragraph.

28. The representative of Cuba suggested deleting in the same paragraph the word "exceptionally" as limiting the pertinent right of a State Party.

29. The representative of Mexico drew attention to the proposals submitted by the Government of Mexico with regard to those articles and contained in paragraph 29 of document E/CN.4/1995/WG.11/WP.1. In particular, he suggested that the phrase "exceptionally and for reasons given confidentially" should be deleted from paragraph 4 of the consolidated text.

30. At its 7th plenary meeting, the chairperson of the informal drafting group proposed a consolidated text for articles 10 and 11, to be included in annex I to the report and to serve as a basis for the second reading of the draft optional protocol. She pointed out that that text had originally been proposed by the delegation of El Salvador and had subsequently been amended to include all the views expressed during the informal drafting process. The chairperson added that the text was proposed on the understanding that draft articles 10 and 11 as proposed by Costa Rica (contained in document E/CN.4/1991/66) and the proposal for a consolidated text of articles 10 and 11 submitted by the delegation of the United States of America (as contained in the annex to document E/CN.4/1995/38 and entitled "Possible consolidation of articles 10 and 11") and the proposal for a revised text of article 10 and article 11 submitted by the delegation of China (as contained in E/CN.4/1995/38 under the headings Article 10 and Article 11) would be included in annex II to the report, in order to facilitate discussion of these articles in second reading.

31. The representative of Mexico requested clarification of the term "expert" as referred to in paragraph 8 of the proposal of the informal drafting group, stating that that was an issue not yet agreed upon by the working group.

32. The chairperson of the informal drafting group explained that the term was used to indicate non-members of the sub-committee.

33. The working group adopted the proposal of the chairperson of the informal drafting group. For the text of consolidated articles 10 and 11 as proposed by the informal drafting group, see annex I. For the text of the other proposals referred to above, see annex II.

Article 14

34. Article 14 was considered by the working group at its 1st, 2nd and 5th plenary meetings, on 30 October and 9 November 1995.

35. All the participants recognized the importance of the principle of confidentiality in relations between the sub-committee and the States Parties. Opinions were divided over the extent of this principle and the exceptions thereto. Some delegations took the position that the decision to deviate from the principle of confidentiality should rest exclusively with the State Party concerned. Other delegations supported the provision to the sub-committee of some discretion to make a public statement or publish a report in whole or in part if a State Party made part of a report public. All the participants agreed on changing the order of the paragraphs in the original draft of the article, so as first to state that general principle and subsequently to refer to the exceptions.

36. All the participants recognized the importance of the principle of cooperation as the basis of an effective optional protocol. All agreed that the sub-committee should consider the views of the State Party in the preparation of its report. Some delegations felt the State Party concerned should be allowed to modify the report of the sub-committee. Other delegations considered that that would be detrimental to the independence of the sub-committee and would prejudge the quality of its membership.

37. All the participants recognized that the article should be based on recognition of good faith on the part of both the States Parties and the sub-committee, without, however, the Protocol losing its effectiveness to achieve its purpose, which was to protect persons deprived of their liberty. Some delegations therefore wished to provide the sub-committee with the power to make a public statement or to publish the report in those instances where a State Party failed to cooperate.

38. The representative of Chile put forward the following proposal: "If a State Party decides to refuse or to postpone a visit, the Committee will analyse the reasons put forward by the State in question and if, in its judgement, they have sufficient basis, it will be able to make a public statement on the matter."

39. The representative of China put forward the following proposal for a replacement of article 14:

> "1. After each mission [visit], the members of the delegation shall draw up an informal report on the facts found during the mission [visit], and shall transmit to the State Party concerned the informal report together with any necessary recommendations.
>
> "2. The State Party concerned may, after receiving the informal report and recommendations, make comments and modifications, as it considers necessary, on the informal report, as well as the recommendations.

"3. The Sub-Committee shall, on the basis of the informal report and the response from the State Party concerned, prepare its report. In its preparation of its report, the Sub-Committee shall give fair and equitable consideration to the comments and modifications offered by the State Party concerned and shall list these as annex to its report.

"4. The Sub-Committee shall transmit its report and any reasonable recommendations to the State Party concerned, with a view to encourage the improvement in the protection of persons deprived of their liberty."

40. The representative of Australia expressed the view that the Committee against Torture, rather than the sub-committee, might be the appropriate body to make a public statement.

41. The representative of Japan proposed the following amendments to paragraphs 2, 3 and 4 of article 14 contained in document E/CN.4/1991/66:

1. In the second, third and fourth lines of paragraph 2, the words "the Committee ... by a majority of its members" should be replaced by "the Sub-Committee may decide by a two-thirds majority of its members".

2. In the fifth line, the words "or to publish the Sub-Committee's report" should be deleted, since such a sanction would be inappropriate.

3. In paragraph 3, the whole of the second sentence, which started with the words "If the State Party", should be deleted.

4. In paragraph 4, the whole of the second sentence, which started with the words "Members of the Committee", should be replaced by "Members of the Sub-Committee and other persons assisting the Sub-Committee are required, during and after their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions."

42. The representatives of Canada and the Netherlands and the observer for Switzerland considered that a simple majority rather than a two-thirds majority would be appropriate for the sub-committee to decide on the publication of a report.

43. The representative of Mexico stated it was important to clarify what exactly would constitute the failure of a State Party to cooperate.

44. The representative of Ethiopia favoured the inclusion of wording in article 14 to clarify the role of the sub-committee in instances where States Parties were willing to implement recommendations but were unable to do so owing to lack of resources.

45. The representative of South Africa was in favour of keeping the recommendations of the sub-committee confidential. He drew attention to the genuine problem of States that lacked the means to implement the

sub-committee's recommendations and expressed support for the establishment of a voluntary fund under the optional protocol. The representative of Senegal supported that position with regard to States unable to finance the implementation of the sub-committee's recommendations and suggested that a reference to consultative or advisory services should be included in the optional protocol.

46. The representative of Cuba urged that any elements in the draft optional protocol that would incite States to abstain from supporting the draft should be avoided. She recalled the sensitivity of the matter and its liability to political abuse, especially if elements were introduced that intruded upon national sovereignty. The aim of article 14 should be cooperation between the sub-committee and the States Parties and not condemnation. Therefore, confidentiality was required in all aspects of the process. Bearing in mind those considerations, her delegation submitted the following proposals:

> "1. All the proceedings of the Sub-Committee and all stages of cooperation between the States Parties and the Sub-Committee shall remain confidential. Members of the Sub-Committee are required to maintain confidentiality during and after their terms of Office.
>
> New paragraphs
>
> "Apart from visits to be carried out in accordance with article 8 of the present Protocol, the cooperation between States Parties and the Sub-Committee shall also include regular exchange of information and an inquiry to be made by the Sub-Committee to any State Party after receiving reliable and well founded information that indicates to it that torture is being systematically practised in the territory.
>
> "Subject to the rules of confidentiality and after all these procedures have been completed, the Sub-Committee may, in consultation with the State Party concerned, decide to include a summary account of the results of this cooperation in its report to the States Parties to the Convention against Torture that have ratified or acceded to the present Protocol."

47. The observer for Uruguay said that her delegation wished to strengthen the principle of confidentiality in the work of the sub-committee during its missions, in order to obtain the necessary cooperation of the State Party concerned. The working group might consider clarifying that principle in the optional protocol by establishing it as the general rule before enumerating the exceptions. She suggested that reference should be made to the need for the sub-committee to consult the State Party concerned before deciding to use the measures established as exceptions.

48. The observer for Nigeria stated that his delegation disliked paragraph 2 of article 14. He expressed his delegation's willingness to work on the basis of the Chinese proposal, which he judged an interesting compromise between the Chilean and the Cuban proposals. The representative of Nicaragua also expressed his delegation's support for the Chinese proposal.

49. The observer for Switzerland said that paragraph 4 of article 14 guaranteed confidentiality and that there existed no reason for the concerns expressed by other delegations on that subject. Paragraph 2 of article 14 applied only in the case of non-cooperation of a State Party and it was crucial to keep the only sanction provided for in the optional protocol which had an important persuasive, deterring and preventive effect, albeit only as a measure of last resort. He considered that the Chinese proposal went too far in the discretion of protecting the right of States Parties and that paragraph 1 of article 14 already provided for States Parties' observations to be taken into account.

50. The observer for Costa Rica referred to the Uruguayan proposal and suggested replacing paragraph 4 as paragraph 2 of article 14 and renumbering existing paragraphs 2 and 3 as 3 and 4 respectively, in order first to state the general principle of confidentiality and subsequently to state the possibility of exceptions thereto. The delegation of Costa Rica agreed with the Chilean suggestion to refer to the possibility of non-cooperation of States Parties in wording that both clearly defined the area of non-cooperation and did not give a State Party the right to censure the sub-committee's report.

51. The representatives of Canada, the United Kingdom of Great Britain and Northern Ireland and the United States of America expressed their wish to continue working on the basis of article 14 in its original drafting.

52. At its 5th plenary meeting, after the various proposals had been discussed in the informal drafting group, the chairperson of that group introduced a revised draft of article 14 which took into account the divergent views presented during the drafting group's meetings. She explained that the new draft contained five paragraphs instead of the four contained in the draft text proposed by the Government of Costa Rica; that paragraphs 2 and 4 had changed places and that a separate paragraph 5 had been added, reading "No personal data shall be published without the express consent of the person concerned.", which would relate to the entire article. Paragraph 4 was placed in square brackets and the proposals concerning that paragraph presented by the delegation of Chile and supported by most of the delegations, would be reproduced in annex II to the report, as would be the proposals made by the delegations of the Netherlands and China, in order to facilitate the discussion of paragraph 5 during the second reading.

53. The representative of Chile wished to place on record that his delegation's proposal had received wide support and that for his delegation the inclusion of paragraph 5 had not been necessary. In view of the nature of the protocol, there could be no restriction upon decisions or actions undertaken under it by the Committee or the sub-committee. The introduction of concepts such as the prior consent of a State to a visit was inappropriate for a protocol which was optional. He further requested the Secretariat, in drafting the report, to name the originators of the proposals, so as to facilitate the future work of the working group.

54. The delegations of Chile, Argentina, the Netherlands, Australia, Canada, the United States of America, the United Kingdom of Great Britain and Northern Ireland, France, Finland, Germany, South Africa, and the observers for the International Commission of Jurists and the Association for the

Prevention of Torture noted that the text of article 14, paragraph 4, did not fully reflect the degree of consensus arrived at during the informal drafting process. They were in favour of including the consensus proposal tabled by Chile and the amendment by the Netherlands thereto in the report to facilitate the debate on that paragraph in the second reading. Those proposals can be found in annex II to the present report.

55. The representative of Chile opposed any restriction on the discretion of the sub-committee to decide or act in accordance with the provisions of the text adopted. In general, he opposed the inclusion of any options in a protocol that was itself optional.

56. The representatives of Chile and Canada and the observer for the International Commission of Jurists considered that the proposed paragraph 5 could be omitted.

57. The representative of the Netherlands supported that position and considered the inclusion of text in conformity with paragraph 4 important because it would complete a range of possibilities for the sub-committee to take action if a State Party failed to cooperate and to comply with the obligations set out in the instrument to which it had voluntarily become a party.

58. Dr. Sorensen feared that not explicitly referring to a "report which will contain the facts on the basis of which the sub-committee makes recommendations", in paragraph 2, would unduly restrict the sub-committee in its work. With respect to paragraph 4, he informed the working group that the Committee on Torture had only once used its ultimate measure of making a public statement in its eight years of experience, during which some 40 visits to 26 States had been undertaken by the Committee. That public statement had not dealt with the lack of cooperation of a State, but with a continuous refusal to implement the Committee's recommendations. It had been made after three visits by 13 persons for two weeks each and after two additional visits to negotiate with the State concerned.

59. The representative of China stated that the sensitivity of the subject-matter of paragraph 4 required a prudent approach, wherein the purpose and effects of any unilateral action undertaken by the sub-committee should be considered. Also, a clear procedure for cooperation should be established. His delegation was in favour of a flexible approach in the draft optional protocol, the universal nature of which called for the consideration of the views and conditions of all States and especially the States Parties to the Convention against Torture.

60. The observer for the International Commission of Jurists said that the universality of the instrument was important, but should not be achieved at the cost of losing the very essence of the draft optional protocol, which required the spelling out of clear and specific obligations for the States Parties. In his opinion, the effective protection of persons deprived of their liberty required a provision allowing the sub-committee to take action if a State Party failed to cooperate.

61. The representatives of Brazil and the Russian Federation considered that only after all means of cooperation between the sub-committee and the States

Parties were exhausted, should the sub-committee be given the possibility of making a public statement regarding the non-cooperation of a State Party, but it should not be given the possibility of publishing the report, since that would be tantamount to a sanction. The representative of Algeria also opposed provision for the publication of a report by the sub-committee. The representatives of Brazil, Mexico and the Russian Federation stated that they wished to establish a clear procedure for cooperation. The representative of Mexico said, in addition, that the relationship between the sub-committee and the Convention against Torture needed clarification.

62. The representative of Canada stressed that the draft optional protocol should set out principles, but not procedures, which would have to be arranged by the sub-committee itself.

63. The observer for Amnesty International expressed her support for the provision contained in paragraph 4 and the Chilean compromise proposal. She considered confidentiality and dialogue to be key operating principles of the draft optional protocol. Torture took place in over 100 countries in all regions of the world; the scope of the problem justified some discretion for the sub-committee to encourage cooperation on the part of the States Parties that refused to cooperate or implement the recommended improvements. In the absence of such a provision, she feared that the protocol would be ineffective in preventing torture.

64. The representative of El Salvador and the observer for Amnesty International stressed that the principles of cooperation and confidentiality should be seen as a means to achieve the purpose of the protocol, which was to protect persons deprived of their liberty, and not as ends in themselves.

65. The observer for Switzerland considered the provision of a measure of deterrence at the discretion of the sub-committee as a necessary evil and expressed the hope that it would never be used, since such use would imply the failure of cooperation between the sub-committee and the State Party concerned.

66. The representative of Germany said that under the Convention against Torture, States could already seek a dialogue on the prevention of torture and that the draft optional protocol should establish an additional preventive mechanism that would go beyond that provision.

67. At its 5th plenary meeting, the working group adopted the article as submitted by the informal drafting group in first reading. For the text of article 14, see annex I. For the text of additional proposals relating to paragraphs 4 and 5 see annex II.

Article 15

68. At its 2nd and 5th meetings, on 30 October and 9 November 1995, the working group considered article 15.

69. The provisions of this article were examined by the working group in conjunction with article 14 and many of the considerations raised were inseparable from that article. Therefore relevant references were made in

paragraph 1 of article 15 to pertinent paragraphs of article 14. The working group decided to retain paragraph 1 of article 15 as contained in the Costa Rican draft.

70. With respect to paragraph 2, the representative of Japan proposed to insert the words "referred to in article 14" after the word "confidentiality". He further proposed to delete the word "annual" after the word "general". The observer for Sweden called to the attention of the working group the comments made by the Committee against Torture set out in paragraphs 54 and 55 of document E/CN.4/1995/WG.11/WP.1. In particular, she pointed out that the members of the Committee felt that in paragraph 2 of article 15, after the words "general annual report of its activities", the following words should be added: ", including a list of all States Parties visited, the composition of the visiting delegation and the places visited".

71. Submitting the results of the consideration by the informal drafting group of article 15 as a whole and paragraph 2 thereof in particular, its chairperson stated that the group had decided to recommend that the sub-committee should include specific facts in its annual confidential report to the Committee against Torture. The group also proposed that the sub-committee should submit every year a public report to the Committee, including the countries visited and any general recommendations on ways of improving the protection of persons deprived of their liberty. The Committee should include non-confidential information on the activities of the sub-committee in its annual report to the General Assembly.

72. The proposals submitted by the informal drafting group were approved by the working group. For the text of article 15 as revised by the informal drafting group and adopted by the plenary meeting, see annex I.

Article 16

73. The working group considered article 16 at its 2nd, 3rd and 5th plenary meetings, on 30, 31 October and 9 November 1995.

74. The general approach of all delegations was that the expenditures incurred in the implementation of the protocol and the activities of the special fund should be dealt with in separate articles.

75. Most delegations supported the principle that expenditure deriving from the implementation of the protocol should be borne by the regular budget of the United Nations. In that connection, reference was made to General Assembly resolution 47/111 of 16 December 1992, in which the Assembly endorsed the amendments to two conventions, including the Convention against Torture, providing for the financing of the Committee against Torture from the regular budget of the United Nations. In addition, it was felt that the protocol and the envisaged body should follow the principles laid down in relation to the Convention and the Committee against Torture.

76. The representative of Cuba suggested deleting the introductory part of article 16 providing for the expenditures to be borne by the United Nations. The observer for Nigeria also argued that the contributions should be paid by the States Parties themselves.

77. For the reason that the financial obligations under the protocol should be borne by the States Parties only, the representative of Japan suggested redrafting paragraph 1 of article 16 as follows: "States Parties shall be responsible for the expenditure incurred in the implementation of the present Protocol proportionally on the basis of the scale of assessments used by the United Nations." This proposal was supported by two other delegations. The representative of Japan also suggested transferring article 16 from Part IV to Part II of the draft.

78. After consideration of this and other proposals in the informal drafting group, the representative of Japan withdrew the proposal quoted above and suggested adding at the end of proposed new paragraph 1 the words "subject to approval by the General Assembly" and deleting the word "all" in the second line. The majority of delegations spoke against the former proposal and the working group decided to put those words in square brackets.

79. The representative of the United States of America called on other delegations to take into account the financial situation of the United Nations and the resource situation of the Centre for Human Rights. It would not be advisable to impose a financial burden on the Centre unless it was assured that the Centre would receive additional resources for servicing that additional body, which would be quite expensive. Therefore, his delegation believed that the working group should place on record that if regular budget funding was decided upon by the working group, the Secretary-General should provide additional resources from within the existing regular budget of the United Nations to compensate the Centre for Human Rights for the additional expenses occasioned by the establishment of the sub-committee.

80. The majority of delegations expressed the belief that the financial difficulties of the United Nations were temporary and reiterated their position that the work of the sub-committee should be financed from the regular budget of the United Nations.

81. The participants felt that it was necessary to word paragraph 2 of article 16 along the lines of paragraph 3 of article 18 of the Convention against Torture. Consequently, a paragraph with such wording was added as paragraph 2 of this article.

82. At the 5th plenary meeting, the chairperson of the informal drafting group submitted the text of article 16, stating that it was proposed that the article should contain two paragraphs, setting out that the expenditure incurred in the implementation of the protocol should be borne by the United Nations. Paragraph 2 stipulated that the Secretary-General of the United Nations should provide the necessary staff and facilities for the effective performance of the sub-committee. The working group agreed to that proposal.

83. The representative of the Netherlands said that he had suggested the inclusion between brackets of the following text at the end of article 16, paragraph 2: "and through the regular budget of the United Nations". He regretted that he had been forced to withdraw that widely supported amendment owing to the insistence of one delegation.

84. For the text of article 16, as revised by the informal drafting group and adopted by the plenary meeting, see annex I.

Article 16 bis

85. The working group decided to formulate issues relating to a special fund in a separate article 16 bis, and considered this article at its 3rd and 5th plenary meetings, on 1 and 9 November 1995.

86. The observer for South Africa suggested the following text for this article:

> "1. A special fund based on voluntary contributions shall be set up in order to help finance the implementation of the recommendations made by the sub-committee to a State Party in view of reinforcing/strengthening if necessary the protection of people deprived of their liberty in the sense of this Protocol.
>
> "2. This fund shall be financed through voluntary contributions made by States and other institutions or bodies.
>
> "3. A Board of Trustees, made up of five persons, selected in their personal capacity by the Secretary-General upon proposals made by the States Parties, will be responsible for supervising the correct use of these funds and their management."

87. The observer for South Africa also emphasized that it was crucial to ensure that the means were available so that all States which lacked the financial resources to implement the recommendations of the sub-committee could obtain the necessary assistance.

88. The majority of delegations supported the idea of establishing such a fund. However, many delegations were of the view that the special fund should be set up in accordance with General Assembly procedures and be administered in accordance with the financial regulations and rules of the United Nations.

89. The observer for Spain pointed out that there were already some funds within the Centre for Human Rights, including the Voluntary Fund for Technical Cooperation in the Field of Human Rights and the United Nations Voluntary Fund for Victims of Torture. Therefore, it would perhaps be wise to strengthen those funds first before establishing a new fund. This idea was supported by the representative of Mexico.

90. The representatives of Brazil, Chile, El Salvador and the United States of America and the observer for Switzerland stated that the existence of other funds should not be considered as an obstacle to the establishment of the new fund, because its objective was different, that of assisting States in the implementation of measures aimed at the improvement of the condition of persons deprived of their liberty.

91. The representatives of Canada and Germany and the observer for Switzerland argued that certain criteria would need to be established and followed to ensure that the countries which really needed the money

obtained it from the fund. The observer for Switzerland said that his Government was prepared to contribute to the fund if it was established.

92. The representative of Germany added that a State's contribution to the Voluntary Fund for Technical Cooperation could be earmarked for the specific purpose of improving the conditions of persons deprived of their liberty.

93. The representative of the United Kingdom wished to keep open the option of the fund being operated either through an existing fund or, if not, then possibly through borrowing an existing board of trustees from an existing fund.

94. The representative of Japan expressed the view that the fund should be financed by voluntary contributions made by the States parties to the optional protocol and be administered by the Secretary-General of the United Nations in accordance with the applicable provisions of the financial regulations and rules of the United Nations.

95. After further discussion in the informal drafting group, its chairperson submitted the results of the elaboration of this article. She said that the group proposed to include two paragraphs in article 16 bis. Paragraph 1 provided for the establishment of a special fund to assist countries expressing a need for additional assistance for their ongoing efforts to improve the protection of persons deprived of their liberty. Paragraph 2 set out the sources from which the special fund might be financed.

96. The above provisions, as revised by the informal drafting group, were adopted as article 16 bis. For the text of 16 bis, see annex I.

97. The representative of Canada made the following statement:

> "With respect to article 16 bis, the Canadian delegation has accepted the wording as it appears in the text of the report of the drafting group. But it has done so because it did not wish to block the consensus which was developing in support of a special fund as proposed by the delegation of South Africa. The acceptance, however, was given on the basis that certain concerns of the Canadian delegation be set out in the report of the working group and they are very briefly these, but before making them, the Canadian delegation would like to emphasize again that Canada is very much in support of the objective of assistance to countries which will need assistance in the implementation of the recommendations of the sub-committee. That being said, we would like to make it clear that we have reservations and concerns with the proliferation of special funds. We feel strongly that the promotion of the protection of human rights should be financed principally through the regular budget of the United Nations. Moreover, the Canadian delegation is concerned that funds such as this should not be created in treaty documents but rather by General Assembly resolutions. Finally, the Canadian delegation would like to repeat its support for the suggestion for the use of the existing Voluntary Fund, because we are also concerned at the expensive administration of these funds."

98. The representative of the United States of America proposed submitting to the Commission on Human Rights the following recommendation on behalf of the working group:

> "1. The working group believes that the establishment of a special fund for activities provided for in this protocol should be accomplished in the most economical way possible in order to maximize the amount of voluntary contributions to the fund available for programmes, rather than administration.
>
> 2. To that end the working group recommends that subsequent meetings of the working group continue to keep in mind that the special fund may be efficiently administered by the Board of Trustees of the Voluntary Fund for Technical Cooperation (VFTC) and that the working group also, at its meeting when it finalizes the draft protocol and recommends it for adoption, consider transmitting his recommendation to the Centre for Human Rights for forwarding to the General Assembly through the Economic and Social Council.
>
> 3. With regard to article 16 bis of the draft optional protocol to the Convention against Torture, the working group recommends that the Commission on Human Rights invite States Members of the United Nations to request assistance from the VFTC of the Centre for Human Rights for programmes designed to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment."

He said that that recommendation acknowledged the importance of the special fund and confirmed that in order to make it efficient much of the funds should go to programmes rather than administration.

99. In addition, the representative of the United States pointed out that his delegation had consulted the Advisory Services and Technical Cooperation Branch on that issue and the Branch also agreed that the existing voluntary cooperation structure could handle the additional fund by setting up a separate account, so there would not be any mixing of funds, but it could be administered by the same board of trustees and there would be a large cost saving if that was done. He also addressed the issue in paragraph 2 of the above recommendation and said that paragraph 3 was an intermediate measure before the adoption of the optional protocol and the establishment of a special fund.

100. The majority of delegations supported the United States recommendation. In particular, the representative of France said that the provisions of article 16 bis did not rule out the possible use of an already existing fund such as the Voluntary Fund for Technical Cooperation to strengthen the protection of persons deprived of their liberty.

101. However, the representatives of Cuba, Japan and the Philippines expressed the view that lack of prior consultation in the meetings of the informal drafting group precluded them from giving their support to the recommendation as a recommendation of the working group. The representative of Japan stated that his delegation reserved the position of his Government at the forthcoming session of the Commission on Human Rights on the recommendation.

In addition, he stated that the special fund to be set up in accordance with article 16 bis should be an independent one, administered by the Secretary-General.

Article 17

102. The working group considered article 17 at its 4th and 5th plenary meetings, on 6 and 9 November 1995.

103. In the view of the observer for Sweden, the link between the Committee against Torture and the new sub-committee was not yet very clear. Her delegation would adopt a final stand with regard to the text at the second reading once the link had been better defined. That would in turn determine whether it would suggest a further amendment to the article. If there were not to be close links between the Committee against Torture and the new sub-committee, a proposal could be envisaged that the optional protocol might be opened to ratification or accession also to States which were not parties to the Convention against Torture but were parties to the International Covenant on Civil and Political Rights, which also contained a provision prohibiting torture. That suggestion was supported by the delegations of the Netherlands and Switzerland.

104. The representative of Japan highlighted the two ways in which States could become parties to the optional protocol: through signature and ratification or through accession. He therefore proposed that paragraphs 1 and 2 of article 17 should be replaced by paragraphs 1, 2, 3 and 4 of article 8 of the Optional Protocol to the International Covenant on Civil and Political Rights, with the word "Covenant" being replaced by "Convention". Paragraph 3 of article 17 would then be renumbered as paragraph 5. The representative of Mexico stressed the link between article 17 of the optional protocol and articles 25 and 26 of the Convention against Torture, and emphasized that it would be awkward if States were party to the optional protocol and not the Convention against Torture.

105. Two delegations submitted a revised text of article 17 based on their proposals mentioned above.

106. After further elaboration by the informal drafting group, its chairperson submitted the text of article 17 for consideration and adoption at the 5th plenary meeting. She pointed out that the article contained five paragraphs setting out formalities as to signature, ratification and accession.

107. For the text of article 17, as revised by the informal drafting group, see annex I.

Article 18

108. At its 4th and 5th plenary meetings, on 6 and 9 November 1995, the working group considered article 18.

109. The representative of Australia was of the view that paragraph 1 of the article should be considered in terms of the number of members of the sub-committee dealt with in article 4. Article 4 provided for the expansion

of the sub-committee once there was a significant increase in the number of States Parties. The current requirement of 10 ratifications was too low and did not promote universal participation.

110. The representative of Chile, supported by some other delegations, said that the deposit of the tenth instrument of ratification or accession, provided for in paragraphs 1 and 2, should be sufficient for the optional protocol to enter into force. It should enter into force as soon as possible and therefore paragraphs 1 and 2 should be brought into line with article 27 of the Convention, so that the protocol would enter into force on the thirtieth day after the date of deposit of the instrument of ratification or accession. The group agreed with the latter proposal and decided to reconsider during the second reading the number of ratifications necessary for the protocol to enter into force.

111. The representative of Japan suggested adding the words "with the Secretary-General of the United Nations" after the word "deposit" in paragraphs 1 and 2. The group agreed with that proposal.

112. The representative of Mexico mentioned that paragraphs 1 and 2 were closely linked to article 16, that was to say that, should the sub-committee be financed by voluntary contributions of States Parties and the first 10 State Parties happen to be poor, then the optional protocol would be unable to function efficiently for lack of funds. That problem would not occur should financial support be assured from the regular budget of the United Nations.

113. With respect to paragraph 3, the representative of Japan felt that the possibility of making reservations would be necessary in order to facilitate the States Parties to the Convention becoming States Parties to the Protocol. He therefore proposed deleting the paragraph as a whole or replacing it with the following provision: "A reservation incompatible with the object and purpcse of the present protocol shall not be permitted".

114. The representatives of Canada, Chile, France, the Netherlands and the Russian Federation and the observers for Sweden, South Africa and Switzerland argued that the current text, which excluded any reservations, should be retained.

115. The observer for Sweden, commenting on the proposal by the representative of Japan, drew the attention of the working group to the Vienna Convention on the Law of Treaties, applicable to all treaties, including such protocols. That Convention already contained a provision that no reservations incompatible with the object and purpose of a particular treaty were allowed. She regarded it as essential that no reservations at all should be allowed to the protocol, as proposed in the Costa Rican draft. The observer for Switzerland, supporting that position, pointed out that a form of "negotiated reservations" to preserve legitimate State interests was found in article 13 and that should suffice. A number of delegations and the observer for Amnesty International also considered that it was crucial that no reservations to the protocol should be allowed. The Chairman of the working group referred to the recognition by the International Court of Justice in cases against South Africa of erga omnes obligations in relation to the obligations deriving from human rights standards, among which prohibition of torture was included.

He also referred to the advisory opinion of the Inter-American Court of Human Rights in 1982. In his view, both courts had recognized as inadmissible reservations that would be inconsistent with the object and purpose of the optional protocol.

116. The representatives of Algeria, Mexico and the United States of America shared that point of view and stated that such reservations were also inadmissible under the Vienna Convention on the Law of Treaties. However, they pointed out that reservations addressing procedural issues should be allowed, in order to facilitate the ratification of the protocol by more States. The representative of the United States of America therefore suggested inserting in paragraph 3 after the words "No reservations" the following words "incompatible with the object and purpose of the Convention and Protocol". The group decided to put those words in square brackets.

117. The chairperson of the informal drafting group pointed out that the article consisted of three paragraphs. Paragraph 1 dealt with the entering into force of the protocol. However, the required number of ratifications was still to be decided. Paragraph 2 dealt with the entering into force of the protocol for each State ratifying or acceding to it after the deposit with the Secretary-General of a certain number of instruments of ratification or accession. That number was still to be determined. Paragraph 3 dealt with the reservations.

118. For the text of article 18, as revised by the informal drafting group, see annex I.

Article 18 bis

119. At its 5th plenary meeting, on 9 November 1995, the working group approved the proposal of the informal drafting group to add a new article to the optional protocol relating to application of the protocol in federal States.

120. For the text of article 18 bis see annex I.

Article 19

121. Article 19 was considered by the working group at its 4th and 6th plenary meetings, on 6 and 9 November 1995.

122. The representatives of Chile, the Netherlands and Australia were in favour of the inclusion of safeguards similar to those contained in article 31, paragraph 2 of the Convention against Torture and article 12 of the Optional Protocol to the International Covenant on Civil and Political Rights. In that regard they considered that denunciation should not have the effect of releasing the State Party from its obligations under the protocol in relation to any act or omission which occurred prior to the date at which denunciation became effective, nor should denunciation prejudice the continued consideration of any matter before the sub-committee.

123. The representative of Japan was of the view that there was no need for notification of the Committee against Torture and the sub-committee about denunciation of the protocol and that only the other States Parties should be

notified. She therefore suggested that the words "The Committee against Torture and the Sub-Committee" in the first sentence should be deleted. She also suggested adding the words "of the present Protocol and the Convention" after the words "the other States Parties" in the same sentence.

124. At the 6th plenary meeting the chairperson of the informal drafting group introduced the proposal of that group for a revised draft of article 19. She explained that the article was composed of two paragraphs. The first stated that a State Party might, if it so wished, denounce the protocol, how it could do so and that the denunciation should take effect one year after the date of receipt of notification. The second paragraph dealt with the effect of such denunciation with regard to any act or situation occurring prior to it.

125. For the text of article 19, as adopted by the working group, see annex I.

Article 19 bis

126. Article 19 bis was considered by the working group at its 4th and 6th plenary meetings, on 6 and 9 November 1995. The chairperson of the informal drafting group introduced the proposal of the informal drafting group for the inclusion of a new article setting out the procedure for amendments to the protocol. She explained that the article consisted of three paragraphs, which combined the procedures set out in article 11 of the Optional Protocol to the International Covenant on Civil and Political Rights and article 29 of the Convention against Torture.

127. For the text of article 19 bis as adopted by the working group, see annex I.

Article 19 tertio

128. Article 19 tertio was considered by the working group at its 6th plenary meeting, on 9 November 1995. The chairperson of the informal drafting group introduced the proposal of that group for the inclusion of a new article, the text of which remained to be considered by the working group in second reading, that would provide for the settlement of disputes between States Parties. The working group agreed upon a reference to the article.

129. For the text of the reference to article 19 tertio, as adopted by the working group, see annex I.

Article 20

130. At its 4th and 5th plenary meetings, on 6 and 9 November 1995, the working group considered article 20.

131. The representative of Japan sought to clarify whom the facilities, privileges and immunities referred to in the article should be extended to and in that context suggested replacing the words "of its delegations" in the first line with "experts assisting the missions provided for in the present Protocol". She also mentioned that the words "during the period of their missions" should be added after "the Convention". Lastly, she suggested that the article should be transferred to the last part of Part III.

132. The representative of China stated that his delegation had no difficulty as to the issue of facilities, privileges and immunities for members of the sub-committee. However, it had reservations on the facilities, privileges and immunities provided to the advisers referred to in articles 10 and 11. There should be a closer link between article 20 and articles 10 and 11 of the optional protocol. That issue needed to be further considered during the second reading.

133. The observer for Sweden proposed that instead of new wording being discussed, a legal opinion could be requested as to whether or not the rules of other United Nations bodies and missions could not simply be followed. Therefore, it seemed important to retain a reference to the Convention on Privileges and Immunities of the United Nations, including special missions, which could help the group come up with agreed language.

134. After further consideration in the informal drafting group, the chairperson of that group pointed out that the article set out what privileges and immunities the members of the sub-committee and other members of the delegation should be entitled to. She also pointed out that at the request of a few delegations some words in the article had been put in square brackets and thus they would be further considered during the second reading. The working group decided to transfer the article to the end of Part III.

135. The representative of the United States of America reiterated the request to the Secretariat to obtain the legal opinion of the United Nations Legal Counsel concerning privileges and immunities of "experts on missions for the United Nations".

136. For the text of article 20, as revised by the informal drafting group, see annex I.

Article 20 bis

137. At its 5th plenary meeting, on 9 November 1995, the working group approved the proposal of the informal drafting group to add a new article to the optional protocol concerning the interrelationship between provisions of the protocol and the United Nations Convention on Special Missions.

138. It was therefore proposed to retain the article within square brackets for the time being. In accordance with the decision to move article 20 to Part III, it was also proposed to move the square bracketed article to come after article 20.

139. For the text of article 20 bis, as adopted by the working group, see annex I.

Article 21

140. The working group considered article 21 at its 4th and 5th plenary meetings, on 6 and 9 November 1995.

141. With respect to paragraph 1, the representative of Japan suggested replacing the words "in the archives" by the words "with the

Secretary-General". These new words were inserted in paragraph 1. In addition, he proposed adding a new article concerning settlement of disputes, similar to article 30 of the Convention against Torture.

142. The representatives of Australia and the United States of America and the observer for Sweden called into question the need for such an additional provision on the settlement of disputes as they did not see how disputes of an inter-State nature could arise under the optional protocol.

143. The chairperson of the informal drafting group proposed to the plenary meeting the text of article 21, stating that all the official languages of the United Nations would be equally authentic languages of the protocol.

144. For the text of article 21, as adopted by the working group, see annex I.

III. FUTURE WORK

145. At its 7th plenary meeting, on 10 November 1995, the working group discussed how its work to date could best be continued. There was general agreement that some progress had been made at the fourth session and that a continuation of the work in the same way offered the prospect of the elaboration, within a reasonable period, of a text which could be of great value in the field of the prevention of torture. It would be helpful if the Secretariat could prepare, to assist the working group at its next session, a working paper providing the text of the articles which constituted the outcome of the first reading and which would be discussed in the second reading, together with comments and suggestions made by Governments, United Nations bodies, and non-governmental organizations, including those submitted during the current session of the working group.

IV. ADOPTION OF THE REPORT

146. In compliance with established practice, the present report describes the main issues that were raised in the debate at the plenary meetings of the working group.

147. At its 7th plenary meeting, the group decided to identify by name in the report the delegations and non-governmental organizations which participated in the debate and to describe in more detail their positions and the proposals they had submitted. The Chairman-Rapporteur followed those suggestions, while keeping in mind the necessity of conforming to the limit imposed on the length of reports.

148. The report was adopted at the 8th plenary meeting of the working group on ... March 1996.

Annex I

TEXT OF THE ARTICLES WHICH CONSTITUTE THE OUTCOME OF THE FIRST READING

Article 1

1. A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held [provided that full respect is assured for the principles of non-intervention and the sovereignty of States]. 1/

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from [, and [to take] measures for the prevention of] torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international [standards], [instruments], [law].

Article 2

There shall be established a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [of the Committee against Torture] [which shall carry out the functions laid down in the present Protocol] (hereinafter referred to as the Sub-Committee); the Sub-Committee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

In the application of this Protocol, the Sub-Committee and [the competent national authorities of] the State Party concerned shall cooperate with each other. The Sub-Committee shall be guided by principles of confidentiality and impartiality.

Article 4

1. The Sub-Committee shall consist of [number to be inserted] members. After the [number to be inserted] accession to the present Protocol, the number of members of the Sub-Committee shall increase to [number to be inserted].

2. The members of the Sub-Committee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Sub-Committee may be nationals of the same State.

4. The members of the Sub-Committee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Sub-Committee effectively.

Article 5

1. The members of the Sub-Committee shall be elected in the following manner:

(a) Each State Party may nominate up to three persons possessing the qualifications and meeting the requirements set out in article 4 [one of whom may be a national of a State Party];

[(b) From the nominations received the Committee against Torture shall prepare a list of recommended candidates, taking due account of article 4 of the present Protocol. This list shall consist of not less than twice the number of members of the Sub-Committee to be elected and not more than two and a half times the number of members to be elected;]

(c) The members of the Sub-Committee shall be elected by [the States Parties] [the Committee against Torture] by secret ballot [from the list of recommended candidates prepared by the Committee against Torture].

2. Elections of the members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than [to be determined] after the date of the entry into force of the present Protocol. At least four months before the date of the meeting of the Committee against Torture which precedes the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them [and shall submit it to the Chairman of the Committee against Torture]. [The Chairman of the Committee against Torture shall submit to the Secretary-General the list of recommended candidates prepared in accordance with paragraph 1 (b) of this article.] [The Secretary-General shall submit this list of recommended candidates to the States Parties.]

4. In the election of the members of the Sub-Committee, eligible for election in accordance with article 4, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4 and to the representation of different forms of civilization and of the principal legal systems.

Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

5. If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall]

appoint another person of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 6

The members of the Sub-Committee shall be elected for a term of four years. They shall be eligible for re-election [once] [twice] if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 5, paragraph 2.

Article 7

1. The Sub-Committee shall elect its officers for a term of two years. They may be re-elected [once].

2. The Sub-Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one members shall constitute a quorum;

(b) Decisions of the Sub-Committee shall be made by a majority vote of the members present;

(c) The Sub-Committee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Sub-Committee. After its initial meeting, the Sub-Committee shall meet at such times as shall be provided in its rules of procedure [, but it shall meet for a regular session at least twice a year.]

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of [the Committee against Torture and] the Sub-Committee under this Protocol.

Article 8

The Sub-Committee shall [undertake missions] [establish a programme of missions] to States Parties [based on the criteria capable of guaranteeing the principles of non-selectivity, impartiality, objectivity, transparency and universality] [based on criteria consistent with the principles set out in article 3.] [Apart from programmed missions, it shall also undertake other missions as appear to it to be appropriate].

[Those missions shall be] [mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [undertaken by the express consent of the State Party concerned].

[Without prejudice to the provisions of article 1], [the modalities for carrying out each mission shall be mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [the Sub-Committee and the State Party concerned shall engage in consultation in order to determine the modalities of the mission].

[In preparation for such a mission], the Sub-Committee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission [together with a detailed plan of the mission] [and after consultations with the State Party on the modalities of the mission]. [After such notification,] the Sub-Committee may at any time visit any place referred to [in its detailed plan after a written agreement is given by the said Government] [in article 1, paragraph 1].

Article 9

1. The Sub-Committee [shall] [may] decide to postpone a mission to a State Party if the State Party concerned has agreed to a scheduled visit to its territory by the Committee against Torture, pursuant to article 20, paragraph 3 of the Convention.

2. The Sub-Committee, while respecting the principles set out in article 3, is encouraged to cooperate with relevant United Nations organs and mechanisms as well as international, regional and national institutions or organizations working towards strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.

3. If, on the basis of a regional Convention, a system of visits to places of detention similar to the one under the present Protocol is in force for a State Party, the Sub-Committee shall still be responsible for missions/visits to such a State Party under this Protocol assuring its universal application. However, the Sub-Committee and the bodies established under such regional conventions are encouraged to [cooperate] [consult] with a view to promote the objectives of this Protocol [and avoid duplication of work and missions/visits].

Such cooperation may not exempt the States Parties belonging also to such conventions from cooperating fully with the Sub-Committee, nor [exempt] [preclude] the Sub-Committee from carrying out missions/visits to the territories of those States in the fulfilment of its mandate.

[Each State Party belonging also to such regional conventions is encouraged to submit to the Sub-Committee, on a confidential basis, visit reports drawn up by the regional body in respect of that country and response of the State Party to it.]

4. The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the possibility for any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Consolidated Articles 10 and 11

[1. The missions/[visits] shall be carried out by at least two members of the Sub-Committee. [As a general rule] members of the Sub-Committee shall conduct their missions/[visits] to the State Party concerned [with] [without] the assistance of experts.

2. [In exceptional cases] the Sub-Committee may, if it considers it necessary in order to carry out its tasks efficiently, be assisted by experts known for their professional knowledge and experience in the areas covered by this Protocol.

[Those missions shall be] [mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [undertaken by the express consent of the State Party concerned]. (From art. 8, para. 2.)

[Without prejudice to the provisions of article 1], [the modalities for carrying out each mission shall be mutually agreed between the Sub-Committee and the State Party concerned in a spirit of cooperation] [the Sub-Committee and the State Party concerned shall engage in consultation in order to determine the modalities of the mission.] (From art. 8, para. 3.)

[3. In order to establish a pool of experts available to the Sub-Committee, each State Party may propose to the Sub-Committee a list of [no more than five] persons who [may] [shall] be its nationals.]

[4. When preparing a mission the Sub-Committee will select experts from this pool and [may] complete the delegation with experts proposed by the United Nations Centre for Human Rights and/or the United Nations Crime Prevention Branch or from amongst the existing staff of the United Nations and its specialized agencies.]

5. No member of the delegation, with the exception of interpreters, may be a national of the State to be visited. The conduct of the delegation and of all of its members, shall be bound by the criteria of independence, impartiality, objectivity and confidentiality.

6. Experts to a mission shall be subordinate to and assist the Sub-Committee. They shall in all respects act on the instructions and under the authority of the Sub-Committee. [They shall in no case undertake any missions by themselves under this Protocol.]

7. The names of the experts and interpreters selected by the Sub-Committee to assist a particular mission shall be specified in the notification under [art. 12, para. 1] [art. 8, para. 1].

8. A State Party may, [exceptionally] [and for reasons given confidentially], [declare] [decide] that an expert or interpreter assisting the Sub-Committee may not take part in the mission to the territory under its jurisdiction.]

Article 12

[1,6] [Members of the delegation shall respect the national laws and regulations while undertaking the visits in the territory of the State Party concerned.] [National laws and regulations may not be used or interpreted as means or measures contravening the programme and purpose of the visits.]

2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and promote the full cooperation of all competent authorities. In particular, the State Party shall provide the delegation [in accordance with national laws and regulations] with the following:

(a) Access to its territory [and the right to travel without restriction] [for the purposes of the mission], [to freely visit places and persons referred to in article 1];

(b) All relevant information on the places referred to [in article 1], [in the detailed plan] including information requested about specific persons;

[(c) Unlimited access to any place referred to [in article 1], [in the detailed plan], including the right to move inside such places without restrictions];

(d) Assistance in gaining access to places where the delegation has reason to believe, [on the basis of well-founded and reliable information] that persons may be in situations referred to [in article 1] [and providing a convenient place for private interview];

(e) Providing access to, [and private interview with] any person in situations referred to [in article 1,] whom the delegation wishes to interview, at the request of the delegation and at a convenient location;

(f) Other information available to the State Party which is necessary for the delegation to carry out its task.

3. [Members of the delegation, [the Sub-Committee] may interview in private [at a convenient location to be provided by the competent authorities without being overheard], [without witnesses], and for the time they deem necessary, any person in situations referred to [in article 1]. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been in situations referred to [in article 1] and with any other person or organization that they think may be able to provide them with relevant information for their mission.]

[The members of the Sub-Committee] [where necessary, with the assistance of their advisors] may interview in private, persons in situations referred to [in article 1,] and may communicate with any person whom they believe, on the grounds of reliable information, can supply relevant information.]

Article 13

1. In exceptional circumstances, in the context of a mission the competent authorities of the State Party concerned may make representations to the Sub-Committee or its delegation against a particular visit. Such representations with respect to the particular place to be visited may only be made on the grounds that [serious] disorder, [national defence, public safety, medical condition of a person and/or urgent interrogation relating to a serious crime is in progress] temporarily prevent the carrying out of the visit. The existence or [formal] declaration of a State of Emergency as such shall not be invoked by a State Party as a reason to object to a visit.

2. Following any such representation, the Sub-Committee and the State Party shall immediately enter into consultations regarding the circumstances and seek agreement on arrangements to enable the Sub-Committee to exercise its functions expeditiously. [Such arrangements may include the transfer to another place of any person whom the Sub-Committee proposed to visit.] Until the visit takes place, the State Party shall provide information to the Sub-Committee about any person concerned.

New article 12 bis

Each State Party shall disseminate information about this Protocol, the tasks of the Sub-Committee and the facilities to be provided to the Sub-Committee during a mission to all concerned authorities and ensure the inclusion of such information in the training of relevant personnel, civil, police and military, who are involved in the custody, interrogation or treatment of persons in situations referred to [in article 1].

Article 14

1. After each mission, the Sub-Committee shall draw up a report which shall be submitted to the State Party concerned. The Sub-Committee shall finalize its report after fair consideration is given to comments submitted, within a reasonable time, by the State Party concerned. If the State Party so wishes, its comments shall form an annex to the report.

The Sub-Committee shall transmit to the State Party its report containing any [feasible] recommendations it considers necessary to improve the protection of persons deprived of their liberty. To this effect, the Sub-Committee and the State Party may consult on the implementation of the recommendations, including on ways and means in which the State Party can be assisted.

2. Except as otherwise specified in this article, the information gathered by the Sub-Committee and its delegation in relation to a mission, its report and its consultation [and cooperation] with the State Party concerned shall remain confidential. Members of [the Committee against Torture,] the Sub-Committee and other persons assisting the Sub-Committee are required during and after their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions.

3. At the request of the State Party concerned, the Sub-Committee shall publish its report. By agreement between the Sub-Committee and the State Party, the report may be published or made public in part.

If the State Party decides to make part of the report public, the Sub-Committee may, after consultation with the State Party concerned [and with the consent of the latter], make a public statement or publish the report in whole or in part in order to ensure a balanced presentation of the contents of the report.

4. [If the State Party fails to cooperate or refuses to improve the situation in the light of the Sub-Committee's recommendations, the Committee against Torture may at the request of the Sub-Committee decide by a majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the Sub-Committee's report.]

5. No personal data shall be published without the express consent of the person concerned.

Article 15

1. The Committee against Torture shall examine the reports and recommendations which may be submitted to it by the Sub-Committee. It shall keep them confidential as long as no public statement in accordance with article 14, paragraph 4, has been made or as long as they have not become public in accordance with article 14, paragraph 3, of this Protocol.

2. The Sub-Committee shall submit every year a general confidential report on its activities to the Committee against Torture, including a list of States Parties visited, the composition of the visiting delegations and the places visited. Furthermore, the Sub-Committee shall submit every year a public report, including the countries visited, and may include any general recommendations on ways of improving the protection of persons deprived of their liberty. The Committee against Torture shall include non-confidential information on the activities under this Protocol in its annual report to the General Assembly of the United Nations in accordance with article 24 of the Convention.

Article 16

1. The expenditure incurred by the implementation of the present Protocol, including missions, shall be borne by the United Nations, [subject to the approval of the General Assembly].

2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Sub-Committee under the present Protocol.

Article 16 bis

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the

recommendations made by the Sub-Committee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations as well as other private or public entities.

Article 17

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 18

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the [number to be inserted] instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the [number to be inserted] instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

3. No reservations [incompatible with the object and purpose of the Convention and Protocol] may be made in respect of the provisions of this Protocol.

Article 18 bis

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 19

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who

shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Sub-Committee [the Committee against Torture] has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Sub-Committee [or the Committee against Torture] prior to the date at which the denunciation becomes effective.

Article 19 bis

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment shall come into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

[Article 19 tertio]

[Settlement of disputes between States Parties]

Article 20

(To be moved so as to be the second last article in Part III)

The members of the Sub-Committee and of [its delegation] shall be entitled to the facilities, privileges and immunities [of experts on mission for the United Nations] as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

[Article 20 bis]

[In so far as provisions of this Protocol differ from the United Nations Convention on Special Missions, the provisions of this Protocol shall prevail.]

(To be moved so as to be the last article in Part III)

Article 21

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States.

Note

1/ Several delegations did not agree with certain aspects of the text of paragraph 1 of article 1. They believed that each visit should have the consent of the State Party concerned. Several delegations also suggested that the words "any place in" should be deleted. One delegation had concerns in regard to the wording of the present draft of paragraph 1 of article 1 and reserved the right to revert to it in the light of future agreement on the remaining articles. These concerns did not refer to the words "any place in".

It was further decided by the working group, at its third session, to insert at the end of this note the following words: "A proposal was made by some delegations that further consideration be given at the second reading to adding the words 'arrest or detention', following the words 'deprived of their liberty'".

Annex II

TEXT OF ADDITIONAL PROPOSALS CONSIDERED BY THE WORKING GROUP

Article 10 1/

1. As a general rule, the missions shall be carried out by at least two members of the Sub-Committee, assisted by experts and interpreters if necessary.

2. No member of a delegation shall be a national of the State to be visited.

Article 11 1/

1. Experts shall act on the instructions and under the authority of the Sub-Committee. They shall have particular knowledge and experience in the areas covered by this Protocol and shall be bound by the same duties of independence, impartiality and availability as the members of the Sub-Committee.

2. A State Party may exceptionally and for reasons given confidentially declare that an expert or other person assisting the Sub-Committee may not take part in a mission to its territory.

Possible consolidation of articles 10 and 11 2/

[1. As a general rule, missions shall be carried out by at least two members of the Sub-Committee.

2. The Sub-Committee may, if it considers it necessary or advisable [in order to carry out its tasks efficiently and effectively, be assisted by advisers and interpreters.

2 (a). The Sub-Committee shall select advisers from a list of experts known for their professional knowledge and experience in the areas covered by this Protocol to be prepared by the United Nations Centre for Human Rights in cooperation with the United Nations Crime Prevention Branch. All States Parties are invited to submit names of prospective advisers possessing the required qualifications to the United Nations Centre for Human Rights for consideration in preparing the list.

2 (b). Advisers shall be bound by the same principles of independence, impartiality and availability as the members of the Sub-Committee.

2 (c). Advisers shall be subordinate to and assist the Sub-Committee. They shall in all respects act on the instructions and under the authority of the Sub-Committee.

3. No member of a delegation shall be a national of the State to be visited.

4. A State Party may exceptionally and for reasons given confidentially declare that an adviser or interpreter assisting the Sub-Committee may not take part in a mission to territory under its jurisdiction.

5. The names of advisers and interpreters selected to assist a particular mission shall be specified in the notification under article 12, paragraph 1.]

Article 10 3/

The missions/visits shall be carried out by at least two members of the Sub-Committee. Members of the Sub-Committee shall independently complete their missions/visits to the State Party concerned.

Article 11 3/

[1. In exceptional cases, the Sub-Committee may, after full consultations with, and having obtained permission of the State Party concerned, invite advisers in the personal name of members of the Sub-Committee who will carry out the missions/visits to assist them in the missions/visits. However, the number of the advisers invited shall in no case exceed two for each of the missions/visits.

2. Each State Party shall designate no more than five nationals of its State as advisers. The State Party shall submit its list of advisers to the Sub-Committee. The Sub-Committee shall notify States Parties of all lists received.

3. Those advisers shall have particular knowledge and experience in the area covered by the Protocol, and shall be bound by the criteria of independence, impartiality, objectivity, confidentiality and the code of professional conducts.

4. Advisers shall provide only, with their professional knowledge and experience, professional opinions to the members of the Sub-Committee on the given questions raised during the missions/visits. They shall in no case undertake any missions/visits by themselves.

5. A State Party may request that advisers be selected by the Sub-Committee from its list of advisers. The Sub-Committee shall respect such a request of the State Party. However, in case there is no adviser designated by the State Party, whose particular knowledge and experience meet the needs of the Sub-Committee, the Sub-Committee may, based on the recommendations by the said State Party, make a selection from the list of the other States Parties.

6. The State Party may, in any circumstances, decide that advisers should not undertake/or continue to undertake their assistance in the missions/visits. In this case, members of the Sub-Committee on the mission shall stop the assistance by the advisers concerned.]

Article 14 4/

Paragraph 4

(a) If after a visit a State Party within a reasonable time shows no willingness to cooperate in improving the protection of persons deprived of their liberty, and once the means to obtain such cooperation have been exhausted, the Sub-Committee, after the State Party concerned has had an

opportunity to make known its views, may [recommend the Committee against Torture to] make a public statement [and/or publish the report] with a view to improving the existing situation of such persons.

(b) If a State Party refuses a mission/visit or postpones it, in terms contrary to the provisions of this Protocol, the Sub-Committee may make a public statement on the matter.

Paragraph 5

(a) If the Sub-Committee decides that a State Party has failed to cooperate, it will [formally] bring the matter [in writing] to the attention of the State Party concerned, which shall [will be requested to] provide an explanation within the time-limit set by the Sub-Committee [on a case-by-case basis], on - inter alia - the appropriate measures it has taken or is in the process of taking, to improve the protection of persons deprived of their liberty.

(b) 5/ If no or insufficient explanation [information] is received from the State Party concerned by the Sub-Committee within the time-limit, the Sub-Committee may make [a decision whether to recommend the Committee against Torture to make] at its earliest convenience a public statement [or to publish the report], [or to further hold consultation with the State Party concerned].

Paragraph 4 6/

(a) If the Sub-Committee considers that a State Party has shown no willingness to cooperate, including refusal or postponement of a mission/visit in terms contrary to the provisions of this Protocol, it may, with the consent of the State Party concerned, make a public statement on the matter of cooperation between the Sub-Committee and the State Party concerned, make a public statement on the matter of cooperation between the Sub-Committee and the State Party concerned [and/or publish the report].

(b) A State Party may, at any time, declare that it recognizes the competence of the Sub-Committee to make a public statement [and/or publish the report] under circumstances referred to in the previous paragraph, even if it has no consent from the State Party.

New text of paragraph 4 7/

4 (a). If after a visit, a State Party shows no willingness to cooperate in improving the protection of persons deprived of their liberty, the Sub-Committee may invite the State Party concerned to explain, inter alia, the appropriate measures it has taken.

(b) If within three months no or insufficient explanation is received and once the Sub-Committee has established that the means to obtain cooperation by the State Party concerned are exhausted, the Sub-Committee may [propose the Committee against Torture to] inform the State Party that it [the Committee against Torture] intends to make a public statement [and/or publish the report].

(c) The Sub-Committee [the Committee against Torture] shall publish its statement [and/or the report] together with an explanatory letter from the State Party concerned, if and when such a letter is received within a reasonable period of time to be determined by the Sub-Committee.

(d) If a State Party refuses a mission/visit or postpones it, in terms contrary to the provisions of this Protocol, the Sub-Committee may make a public statement on the matter.

Notes

1/ Costa Rican proposal.

2/ As submitted by the delegation of the United States of America.

3/ As submitted by the delegation of China.

4/ As submitted by the delegation of Chile.

5/ As submitted by the delegation of the Netherlands and accepted by the delegation of Chile.

6/ As submitted by the delegation of China.

7/ As submitted by the delegation of the Netherlands.